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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/768,478 01/24/01 FEHN

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EXAMINER

MANILOVE, S

ART UNIT

PAPER NUMBER

1772

DATE MAILED:

06/28/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

<b>Office Action Summary</b>	Application No. 09/768,478	Applicant(s) FEHN, GREGORY M.	
	Examiner Shalie A. Manlove	Art Unit 1772	

mk-7

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on Oct. 4, 2001.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-22, 44-87, and 113-138 is/are pending in the application.
- 4a) Of the above claim(s) 1-22, 60-87, and 113-138 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 44-59 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

- 15) ☒ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other:

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**DETAILED ACTION**

***Election/Restrictions***

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

Group I. Claims 1-22, and 44-59, drawn to container, classified in Class 428, subclass 36.6.

Group II. Claims 60-87, and 113-138, drawn to method, classified in Class 264, subclass 513.

The inventions are distinct from each other because of the following reasons:

Inventions: Group I and Group II are related as process of making and product made. The inventions are distinct if either or both can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP 806.05(f)). In the instant case the product as claimed can be made by a materially different process such as co-extrusion.

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

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2. This application contains claims directed to the following patentably distinct species of the claimed invention:

A. Claims 1-22 references polypropylene

B. Claims 44-59 references fluorinated polyethylene

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claims are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

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A telephone call was made to Mr. Eugene Friedman on June 11, 2001 to request an oral election to the above restriction requirement, a provisional election was made with traverse to prosecute the invention of item Group I, Species B, claims 44-59.

Applicant in responding to this Office action must make affirmation of this election.

Claims 1-22, 60-87, and 113-138 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected product, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 5.

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 44-54 and 58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta et al (USPN 4,880,675) in view of Moore et al (USPN 5,712,009).

Mehta et al teach a plastic container comprising a fluorinated inner layer and a polypropylene outer layer which is formed by conventional blowmolding, thermoforming or injection process

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(col. 2, lines 6-17). The fluorinated PE surface forms the interior surface of the container (col. 2, 18-19). Mehta et al fail to teach an outer layer of post consumer recycled polyethylene. However, Moore et al suggest the use of post consumer recycled polyethylene in the production of plastic beverage and food containers due to the large quantities available to reduce waste and cost.

It would have been obvious to one of ordinary skill in the art to substitute a post consumer recycled polyethylene for the polypropylene taught by Mehta in combination with the fluorinated polyethylene to achieve a container having good barrier properties.

-- Mehta is silent as to the continuity of the fluorinated polyethylene film, however it is thought to be inherently continuous or uninterrupted to achieve the desired barrier properties.

Mehta et al also fail to specifically teach the weight percent of the container of the post consumer recycled plastic. Moore et al disclose post consumer recycled layers of 10 and 70% of the wall container and 10% of the innermost and outermost polyethylene layers (fig. 2). Moore et al also disclose the densities of the various materials which make up the different layers (Table 1, col. 3, lines 47—col. 4, lines 1-9).

It would have been obvious to one of ordinary skill in the art to substitute post consumer recycled polyethylene as suggested by Moore et al for the polypropylene taught by Mehta and to use general mathematical principals to determine suitable weight percent for post consumer recycled layers to achieve the desired barrier properties and processability in forming a container out of recycled plastic.

Moore et al suggest that post consumer resin be used because of the large quantities of HDPE post consumer resin available (col. 1, lines 34-39).

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It therefore would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin, which includes a majority of polyethylene.

Moore et al also recognizes that post consumer plastic has contaminants. Thus, it would have been obvious to one of ordinary skill in the art to use a post consumer plastic having greater than 48 ppb/. 020 in. of contaminant, without undue experimentation.

Claims 55 and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta in view of Moore et al as applied to claim 44 above, and further in view of Avery (USPN 4,982,872).

Mehta and Moore et al fail to teach a container wherein the film is of sufficient thickness to prevent the passage of post consumer recycled plastic contaminants into the contents of the container. Avery discusses the importance of the thickness of the barrier layer (col. 9, lines 32-50) and the importance that the barrier layer be sufficient so that the structure containing recycled plastics is not exposed to the food or other product to be packaged (col. 10, lines 30-32).

It would have been obvious to one of ordinary skill in the art to make a container having a post consumer recycled polyethylene exterior layer at least 15% by weight of the container having an interior continuous fluorinated polyethylene film layer of sufficient thickness to prevent migration of contaminants onto the contents of the container without undue experimentation.

Additionally, it is the structural differences between the prior art and the claimed invention, which determine Patentability. It has not been shown that the prior art structure taught by Metha is not capable of performing the claimed function.

Claim 57 and 59 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta, and Moore et al as applied to claim 44 above, and further in view of Strum et al (USPN 4,824,618).

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Strum et al teach multilayered structures for plastic bottles for beverages having a structural layer of PP or PE as the innermost, or outermost or both layers, and an intermediate barrier layer, adhesive layers and at least one layer of reground material to reduce waste and cost (col. 1, lines 22-46).

It would have been obvious to one of ordinary skill in the art to use a reground layer as an outer layer to reduce waste and cost.

*Conclusion*

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Ofstein (USPN 5,064,724; 5,049,449; 4,999,254).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shalie A. Manlove whose telephone number is (703) 308-8275.

The examiner can normally be reached on M-F 8:00- 5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Y. Pyon can be reached on (703) 308-4251. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-3599 for regular communications and (703) 305 3599 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Shalie A. Manlove  
Examiner  
Art Unit 1772

June 13, 2001

  
**BLAINE COPENHEAVER**  
**SUPERVISORY PATENT EXAMINER**  
**TECHNOLOGY CENTER 1700**